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No. 218

Brief of Wiler for Def't.

IN THE

Supreme Court of the United States

Filed April 10, 1900.

George H. Earle, Jr., receiver of the Chestnut Street National Bank, of Philadelphia, Penna.

Plaintiff in Error

vs.

The Commonwealth of Pennsylvania, at the suggestion and to the use of The Commonwealth Title Insurance and Trust Company, trustee for Mary Rodgers under the Will of Benjamin Mifflin, deceased

Defendant in Error

Error to the Supreme Court of the State of Pennsylvania

BRIEF OF DEFENDANT IN ERROR

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Argument for Defendant in Error.

The facts briefly are as follows:

Plaintiff recovered judgment against defendant on September 29, 1897, for $31,499, and on October 5, 1897, issued an attachment, *sur* judgment, summoning specifically M. Simpson McCullough as garnishee. The writ, however, read as follows: "And also, that by honest and lawful men of your bailiwick, you make known to the said defendant and to M. Simpson McCullough *and all other persons in whose hands or possession the said goods and chattels, stocks, moneys, interest and debts,* or any of them may be attached, as garnishees, that they be and appear before our said Court, at Philadelphia, on the first Monday of November next, to show if anything they, the said defendant or the said garnishees, have to say why the said judgment, besides cost of suit, should not be levied of the effects of the said defendant in the hands of the said garnishees. And have you then and there this writ."

Before the return day of the writ, and in pursuance thereof, the Chestnut Street National Bank was, on October 28, 1897, duly served and made an additional garnishee. November 6, 1897, interrogatories to said bank garnishee were filed with rule to answer. November 24, 1897, the bank filed its answer, in which it set up the following facts, viz.:

September 20, 1897, James Long closed his deposit account in said bank, and received a bank due-bill for $2900. On November 3, 1897, he surrendered to said bank the due-bill of September 20, 1897, for $2900, and said bank appropriated, at his request, $455.68 to payment of interest on his loan to said bank, for which they held certain collateral, and gave him a new due-bill for $2444.32, which due-bill of $2444.32 they afterwards paid to said Long.

It will be seen from this that when the attachment was served the bank, garnishee, owed Long $2900 on its due-bill of September 20, 1897, so that on November 3, 1897, when Long presented it for payment, it was bound by the attachment.

The answer further states:

That Long is indebted to the bank in $17,831, with interest from April 22, 1897, and that they have as collateral thirty-three shares of Eighth National Bank valued at $264 per share, and seventy-seven shares of Natural Gas Trust stock valued at $160 per share. On this the Court made the order complained of, which is, unquestionably, the proper form of order in such cases.

The only point is: Appellants say that subsequently to the attachment, to wit, on December 23, 1897, said bank suspended payment, and George H. Earle was, on January 29, 1898, duly appointed receiver, and said receiver, on May 2, 1898, moved to vacate the attachment, alleging that the Court of Common Pleas had no power to issue an attachment by which a depositor's and pledgor's account could be garnisheed, and cited in support thereof Section 5242 of the Revised Statutes of the United States. The Court, in an opinion filed, refused to vacate the attachment and entered the order complained of.

The opinion of the Court was as follows:

ARNOLD, *P. J.*: "Judgment was entered against the defendant, James Long, on September 29, 1897, for $31,499, and on October 5, 1897, an attachment *sur* judgment was issued and served on the Chestnut Street National Bank as garnishee.

To interrogatories the bank answered that Long was indebted to it in the sum of $17,831, with interest from April 22, 1897; that on September 20, 1897, it issued a due-bill for $2900, payable only through the Clearing House the day after issue, and delivered the same to Long, he having closed his account with the bank. The due-bill was not paid through

the Clearing House, but on November 3, 1897, which was nearly a month after the service of the attachment, Long surrendered the due-bill to the bank to pay interest due on his indebtedness above mentioned, which interest was deducted, and the bank issued a new certificate, dated November 3, 1897, for $2444.33, and delivered it to Long. This due-bill was passed through the Clearing House and paid. The bank answered further that when the writ of attachment was served it held as collateral security for the indebtedness to it seventy-seven shares of stock of the National Gas Trust of the value of $160 per share, and thirty-three shares of the capital stock of the Eighth National Bank of the value of $264 per share.

The Chestnut Street National Bank failed on December 23, 1897, and is now in the hands of a receiver, who has entered a rule to vacate and dismiss the attachment against that bank for want of jurisdiction in this Court. In support of the rule the receiver relies upon section 5242 of the Revised Statutes of the United States, which is as follows:

'All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money or bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court.'

Were this attachment issued against the bank for a debt due by it, then the claim of the receiver to exemption from

such attachment would be valid. But it is not for an indebtedness of the bank that an attachment was served on it. The attachment is for an indebtedness by Long, and the purpose of the attachment is not to obtain a judgment for a debt, but to inquire and determine whether it has any money or property of Long which is subject to an execution at the suit of his creditors. The purpose of the statute is to prevent one creditor of an insolvent national bank from obtaining a priority over others, and to preserve an equality between its creditors in the distribution of its assets. Therefore it is enacted that no attachment, injunction or execution shall issue against such association or its property before judgment, such, for instance, as a foreign attachment for a debt due by it. The statute does not prevent suits against a national bank in a State court. All it means is that no liens shall be acquired before judgment by attachment, injunction or execution before judgment. After judgment an execution may be issued against a national bank the same as against any other defendant. But this is not a suit against the bank. It is a suit now in judgment against Long, and the attachment is an execution against him, with a clause of *scire facias* to warn the bank to show cause why judgment should not be levied on Long's property in the possession of the bank. The bank admits that when the attachment was served it owed Long $2900 on a Clearing House due-bill which was not paid in the usual course of such due-bills; that Long presented the bill to the bank on November 3, 1897, and the bank paid it by giving Long credit for interest due by him and giving him a new bill. This was a month after the attachment had been served upon the bank. The bank had no right to deal with Long as it did. The plaintiff was entitled to that money and to a finding to that effect. Likewise the plaintiff is entitled to a finding that the bank holds the above-mentioned shares of stock subject to its lien for the indebtedness of Long to it, and the plaintiff is entitled to execution against that stock, subject to the lien of the bank. As to the money, we incline to think that as the

bank is now insolvent the plaintiff can recover no more than a dividend, and is not entitled to any priority over the other creditors of the bank. As to the stock, the plaintiff is entitled to a *fi. fa.* to sell that subject to a claim of the bank.

The foregoing reasoning has the support of a decision of the Court of Appeals of New York, which held that section 5242 of the Revised Statutes of the United States does not prohibit the issue of an attachment, injunction or execution against an insolvent national bank for property of a third person in the custody of the bank. *Corn Exhange Bank* vs. *Blye*, 101 N. Y., 303.

Rule discharged."

The Court then entered the following order.

"And now, to wit, May 21, 1898, upon the hearing of the attachment in the above case, and the interrogatories of the plaintiff, and the answer of the garnishee thereto, it is adjudged that the above-named garnishee has a deposit in money belonging to the above-named defendant of $2900, with interest from October 28, 1897; and also that the said garnishee has seventy-seven shares of "National Gas Trust Stock" and thirty-three shares of the capital stock of the Eighth National Bank of Philadelphia belonging to the said defendant, and pledged by him with the said garnishee for payment by him to it of the sum of $17,831, with interest thereon from April 22, 1897; and that the plaintiff have execution of any dividends on the said deposit of $2900, with interest in common with the other creditors of said garnishee, less thirty-five dollars counsel fee for the said garnishee's counsel; and that if the said garnishee refuse or neglect, on demand by the Sheriff, to pay the same, then the same to be levied of the said garnishee according to law, as in the case of a judgment against it for its proper debt; and also that the plaintiff have leave to issue a writ of *fieri facias* against the above-named defendant for the sale of the said seventy-seven shares of 'National Gas Trust Stock' and the thirty-three shares of the capital stock of the 'Eighth National Bank'

of Philadelphia, pledged with the defendant by the garnishee, subject to the garnishee's claim under said pledge of the sum of $17,831, with interest thereon from April 22, 1897, or so much thereof as shall be necessary to satisfy the plaintiff's judgment against the defendant in this case, with costs.

By the Court.

M. ARNOLD,
P. J."

The case, so far as the deposit account is concerned, is easily disposed of, for the bank continued to do business long after the attachment was served, and, in point of fact, it admits that on November 3, 1897 (five days after the service of the attachment), it actually paid the defendant, Long, the money bound by this attachment, and, so far as the stock is concerned, the decree in nowise affects the bank or the receiver, as nothing is sold but Long's equity.

Independently of this, however, the Act of Congress referred to has no bearing in cases of attachments, where the object is merely to garnishee a depositor's or pledgor's account, as the attaching creditor only steps in the shoes of the defendant in the attachment. What the act is intended for is to prevent creditors of an insolvent bank from issuing attachments on debts owing by the bank, *qua* bank, and thereby obtain a preference over other creditors. This is the result of all the decisions cited by the appellant, as a glance at the facts of them will show.

The case of *Pacific National Bank* vs. *Mixter*, 124 U. S., 721, was as follows:

"November 21, 1881, Pacific National Bank of Boston was embarrased and placed in charge of a bank examiner, and remained closed until March 18, 1882, when its doors were opened. At the time the bank resumed business it was indebted to Mixter in $15,000. On March 24, 1881, Mixter began suit against the bank in the Circuit Court of the United States for the District of Massachusetts, by attachment and a deposit of the bank's in Maverick National Bank and Howard National Bank, garnisheed.

After the attachment had been levied the bank arranged with Lewis Colman and J. Shepherd to give security to dissolve the attachment, and the attachment was dissolved. The sureties were indemnified by the bank placing in their hands a certificate of deposit on the Maverick National Bank for $100,000. The bank on May 22, 1882, closed its doors a second time and a receiver was appointed.

The receiver made a motion to dismiss the suit, which was overruled and judgment entered against the bank.

The receiver then filed a bill in equity in said Circuit Court against the attaching creditor and the sureties on the bonds to restrain proceedings on the attachment.

The bill was dismissed and appeal taken.

The Court held the attachment not good, *but allowed the judgment to stand so as to claim a dividend*, and reversed the decree dismissing the bill, and held that the assets held by the sureties for their indemnity should be turned over to the receiver.

In *Bank* vs. *Colby*, 21 Wallace, 609, facts were:

Colby on April 17, 1867, issued an attachment out of the Circuit Court of Dallas County against the First National Bank of Selma, and same day levied on lands of the bank. The bank ceased to do business on April 16, 1867, having that day failed to pay a draft of the United States for $75,000; and on April 17, 1867, the president of the bank absconded, and that day General Swayne, commanding the Federal forces, by direction of the Secretary of the Treasury, took possession of the bank and its possessions. On June 3, 1867, Cornelius Cadle was duly appointed receiver.

Cadle moved to dissolve the attachment, which the Court refused; this ruling was confirmed by the Supreme Court of Alabama. This Court reversed said ruling, Mr. Justice Field in his opinion saying:

"As to the general creditors, the Act evidently intends to secure equality among them in the division of the proceeds

of the property of the bank. The fiftieth section provides for the appointment of a receiver of an insolvent bank who shall take possession of its assets, * * * make a ratable dividend of the money on all claims *proved* to his *satisfaction* or *adjudicated* in a court of competent jurisdiction."

The fifty-second section, further to secure this equality, declares "all transfers * * * with a view to the preference of one creditor over another * * * shall be utterly null and void."

"There is in these provisions a clear manifestation * * * to secure the assets of the bank for ratable distribution among its general creditors. This design would be defeated if preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors so studiously provided for by the Act would be lost, as justly observed by counsel, if preference was left to the race of diligence, creditors living remote from the location of the bank would always be distanced in the contest and the equality promised to them by the Act would be a mere mockery."

Cadle, Receiver, vs. *Tracy*, 11 Blackford, 101.

The facts as they appear on plaintiff in error's brief show that it was similar to *Bank* vs. *Colby*, viz.: a suit by a *creditor of the bank*, who attached moneys of the Alabama Bank in possession of a national bank in New York.

In Garner vs. *Second National Bank of Providence*, 66 Fed. Rep., 369.

The plaintiff, a resident of New York, brought her action in a State Court against defendant national bank and two individuals, all residents of Rhode Island. A warrant of attachment was taken out, and certain moneys of the defendant bank were attached in hands of Fourth National Bank of New York.

A motion was made to remove the cause to the Circuit

Court of United States, which was allowed and the attachment dissolved.

Southwick vs. *First National Bank of Memphis*, 7 Hun., 96.

"The defendant is a national bank located at Memphis, Tenn. At the beginning of the action the plaintiff obtained an attachment against the defendant, and levied same upon moneys in the Park Bank, in the City of New York, belonging to defendant.

The defendant moved to vacate the attachment on the ground that it was issued in violation of Section 57 of the National Banking Act of 1864, as amended by Section 2 of Chapter 269 of the laws of Congress of 1873. As so amended, that section reads as follows: "* * * *And provided further*, that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any such suit, action or proceedings in any State, county or municipal Court. The Court below held that the case of *Cook* vs. *State National Bank of Boston* (52 N. Y., 96) necessarily involves the question presented in this motion, and accordingly refused to vacate the attachment." * * * "It follows from these views and from the law as laid down in *Cook* vs. *State National Bank of Boston* (*ubi. sup.*) that the attachment in this case was properly issued."

In *Rhoner* vs. *First National Bank of Allentown*, 14 Hun., 126, was practically the same question as *Garner* vs. *Second National Bank* (*supra*). Here Rhoner, who was a creditor of the First National Bank of Allentown, issued in New York an attachment against it, which was dissolved.

In *Central National Bank* vs. *Richmond National Bank*, 52 How., 136.

Both plaintiff and defendant were national banks.

The plaintiff, in violation of Sec. 5242, on August 29, 1876, sued out a warrant of attachment against the de-

fendant, a national bank located at Mansfield, Ohio, and attached the defendant bank's balance in the Fourth National Bank of New York by serving the usual notice.

A motion to vacate the attachment was allowed.

Robinson vs. *National Bank of New Berne*, 81 N. Y., 385 (reported below, 19 Hun., 477). In the Court below Smith, J., says: "The defendant is a banking corporation created under the national banking law of Congress and located and doing business at New Berne, in the State of North Carolina. Upon an affidavit showing these facts and showing that the defendant was indebted to the plaintiff on contract and had personal property within this State a warrant of attachment issued by a justice of this Court against the defendant *before final* judgment. The *appellant contends that the attachment* is *void* for *want of jurisdiction in this Court to issue it.* The claim is based upon the last clause of Section 5242 of the United States Revised Statutes. * * *

"For the plaintiff it is contended that the prohibition * * * applies only to such national banks * * * as have committed or are contemplating an act of insolvency. We are inclined to think that construction correct, and that the purpose of the clause is to prevent *creditors* of *insolvent national banks from obtaining preferences before final judgment.* The language certainly admits of that construction, and we should be unwilling to infer from doubtful and ambiguous language an intention on the part of Congress to divest the State Courts of a pre-existing jurisdiction, even as to a provisional remedy merely."

Our conclusion is, that the order refusing to vacate the attachment should be affirmed. This ruling was affirmed by the Court of Appeals in an elaborate opinion by Danforth, J., 81 N. Y., 385.

National Shoe and Leather Bank of N. Y., et al., vs. *Mechanics' Natl. Bank of Newark, et al.*, 89 N. Y., 440: The facts appear in a very meagre manner, but so far as shown they were attachments by three national banks

against the Mechanics' National Bank of Newark, N. J., an insolvent bank. Mr. Frelinghuysen, the receiver, moved to vacate the attachments, which the Court below did (27 Hun., 53), and on appeal this was affirmed.

Rayner vs. *Bank*, 93 N. Y., 371.

Facts appear in 49 N. Y. Supr. Ct., 119.

Raynor brought suit against Pacific National Bank of Boston on January 9, 1882, on a certificate of deposit for $5000 issued by the defendant by an attachment, and levied on a balance to the credit of defendant bank in the National Park Bank of New York. At time the warrant was issued defendant bank had closed its doors, and was in charge of a bank examiner. May 22, 1882, L. M. Price was appointed receiver. The lower Court vacated the attachment This was affirmed by the Superior Court.

The ruling was affirmed by the Court of Appeals, 93 N. Y. Supr. Ct., RAPALLO, *J.*, saying: "The attachment issued on the 9th of January, 1882. If at the time defendant was insolvent or in contemplation of insolvency the attachment was prohibited by Section 5242. We think the evidence submitted to the Court below was ample to sustain its conclusion that the bank had committed an act of insolvency when the attachment was issued.

"The affidavit on which the attachment was granted stated that the bank was in an embarrassed condition and was about to or had failed.

"At the time of issuing the attachment, January 9, 1882, the property and affairs of the bank were actually in charge of Daniel Medham, a national bank examiner.

"It must be observed that the application to set aside the attachment is not made by the bank for the benefit of its stockholders, but is made for the benefit of the remaining creditors. It cannot be supposed that Congress intended to throw the door open whereby diligent creditors might obtain preference by means of attachment while retaining all the other provisions of Section 5242, designed to guard against such preferences."

Corn Exchange Bank vs. *Blye, Receiver*, 101 N. Y., 303. In this case plaintiff brought suit to recover possession of certain securities, which complainant alleges were pledged to it as security for a draft, which draft was forwarded for collection to said Middletown National Bank, accompanied by the securities, with instructions to hold them until payment of the draft. The draft was not paid, that the bank suspended, defendant was appointed receiver, the securities were delivered to him and he refused to deliver same.

FINCH, *J.*, says: "The sole question is whether Section 5242 of the United States Revised Statutes prohibits the requisition issued to the Sheriff and protects the receiver in his possession. The Bank of Middletown became insolvent and the defendant was appointed its receiver under the Federal law. That appointment vested in him all the assets of the bank to be converted into money and distributed among the creditors. The object sought to be accomplished is the distribution of these assets fairly and without preference, and that has been held to be the aim and purpose of the section in question. (*Robinson* vs. *Bank of Newbern*, 82 N. Y., 385; *Rosenblatt* vs. *Johnson*, 104 U. S. 462.) * * * The receiver by his appointment acquires no right to property in the custody of the bank, which the latter does not own, as against the real owners, and the section in question was plainly not intended to protect the receiver's custody, as against such owner."

The theory of plaintiff in error that because the action was replevin alters the matter is not sound in view of the above language of the Court.

Chesapeake Bank vs. *First National Bank of Baltimore*, 40 Md., 269, MILLER, *J.* "The appellant, on the 18th of September, 1873, caused an attachment *on warrant* to be issued out of the Superior Court of Baltimore City to affect the property and credits of the First National Bank of the City of Washington, as a non-resident debtor, which was laid in the hands of the First National Bank of Balti-

more as garnishee." In October following garnishee moved to quash, which was done, which was affirmed.

First National Bank of Kasson vs. *La Due*, 39 Minn., 415.

In this case La Due, a resident of Minnesota, issued an attachment in New York, and attached moneys of the First National Bank of Kasson in the hands of its New York correspondent. The First National Bank of Kasson then filed a bill in Minnesota against La Due to restrain him from proceeding with his suit in New York. The Court refused the injunction.

Safford vs. *First National Bank of Plattsburg*, 61 Vt. 373:

Was a suit by Safford, a resident of Washington, D. C., against C. W. Witters, *a trustee* of *defendant's bank*. The suit was on an account against the bank. Court say: "The service of a trustee writ upon the trustee and thus preventing the defendant from receiving whatever may be in the hands of the trustee is in legal effect attaching his property, and treating the service as here made as an attachment of the defendant's property, the attachment as we have seen was illegal and void."

Planters' Bank vs. *Berry*, 91 Ga. 264.

"The facts of the case appear to be as taken from the above report, and also 89 Ga., 333. Berry, a creditor of the National Park Bank of New York, issued an attachment, and attached the funds of said bank on deposit with the Planters' Loan and Savings Bank."

In *Freeman Manufacturing Co.* vs. *National Bank of Boston et al.*, 160 Mass., 398:

"These cases come before us on motions of the defendant bank, made under St. 1883, c. 223, § 6, to annul orders of a single Justice of this Court, suspending after appeal decrees of the Superior Court. These decrees dissolved preliminary injunctions which had been issued in the suits, and the injunctions now have been reinstated.

"They prohibit the bank from disposing of certain notes pledged to it, but it is alleged without right and with notice.

"The only question before us is whether a State Court has power to issue such injunctions before final judgment."

A review of all these cases show, as before stated, that not one of them substantiate the plaintiff in error's contention—they are shown to be cases where a *creditor of an insolvent bank* sought to obtain a preference by attachment of the bank's property; whereas the case at bar is an attachment of *Long's* property in the custody of the bank. It would be writing something in the statute that is not there to say that the Act of Congress exempts a depositor's or pledgor's account from attachment. One only has to read the Act to see that the exemption from attachment refers to the property of the bank. It says "no attachment, injunction or execution shall be issued against such association or *its* property before final judgment," etc.

The plaintiff in error would write into the statute after the words "*its property*" the words "or the property of any of its creditors." Of course, Congress did not intend any such thing.

So much of the plaintiff in error's brief as relates to the attachment laws of Pennsylvania we do not think require discussion. And the same thing applies to so much as relates to Long's answers to the bill of discovery, that has nothing to do with this case. The only part of this record that is judicially before this Court is the attachment proceedings against the Chestnut Street National Bank on its answers filed to the interrogatories.

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